KWAN YOON FATT & SONS SDN. BHD. & ANOR.

v.

TRENDS BUILDING SDN. BHD. & 8 ORS.

HIGH COURT MALAYA, SHAH ALAM
DATO' MAHADEV SHANKAR J.
[CIVIL SUIT NO. 22-55-1994]
13 JULY 1994

INJUNCTION: No caveatable interest - Defendants have monetary claim - Whether injunction can be granted.

PRACTICE & PROCEDURE: Affidavits -Whether pleadings -Preliminary objection - Opposite Counsel not notified in advance.

The plaintiff as land owners applied for *inter alia* an injunction against the defendants to restrain than from lodging any further caveats against the said land without the leave of the Court first had and obtained.

The defendants took preliminary objection to the plaintiff's application. It was based on the sole ground that the affidavit-in-support of the application averred in its opening statement that it was made by Kwan Yoke Oon but the type written deponent name at the end of it was Kwan Yoon Fatt. The plaintiffs Counsel was not given advance notice of this objection.

Held:

[1] An affidavit in pending proceedings is a pleading just as much as a statement of claim or a defence. Order 18 r. 8 (i) (b) of the Rules of the High Court 1980 imposes a mandatory obligation upon a party to disclose to the other side any matter which, if not specifically pleaded, might take the opposite party by surprise.

[2] Merely because Trends have been denied a caveatable interest in the first caveat proceedings it does not mean they are not entitled to injunctive relief for the preservation of the said lands until their claims have been heard. Likewise merely because the sub-purchasers do not have caveatable interest it does not mean they are not entitled to injunctive relief at least to the extent of their monetary claims.

[Ordered accordingly].

Legislation referred to:
Legal Profession (Practice & Etiquette) Rules 1978 r. 12, r. 32
Rules of the High Court 1980, O. 18 r. 8 (1)(b) O. 41 r. 4

For the plaintiffs - Logan Sabapathy; M/s. Logan Sabapathy & Co.
For the 5th and 6th defendants - Lailatul Azizi; M/s. Goh & Partners
Ninth defendant appearing in person

JUDGMENT

Mahadev Shankar J:

This is an application for an interlocutory injunction to restrain the defendants from lodging any further caveats against the same lands which are the subject matter of my judgements in UP25-3-94 are the between Pacline and Tan Kim Foong, UP25-14-94 between Pacline and the Pendaftar Hakmilik Selangor, and UP25-12-94 between Pacline and Tan Wee Yoong.

The background of this matter has already been set out at some length in my judgment in UP25-3-94.

In the present action the first defendant (Trends) and the second defendant (Alfred) need no introduction. The third to the ninth defendants are such of the sub-purchasers of units in the housing project as have been made known by Trends to the plaintiffs in the previous proceedings or who have since made themselves known to the plaintiffs.

The relief sought in the main action is a declaration that Trends and their sub-purchasers are not entitled to lodge a caveat over the said lands, that the sale agreements are not binding on the first plaintiff (KYF), and also for an injunction against Trends and its sub-purchasers to restrain them from lodging any further caveats and for various ancillary and consequential reliefs.

I am now concerned only with a summons-in-chambers for an interim injunction (pending the trial of the main action) that none of the defendants should be permitted to caveat against the said land without the leave or Court first had and obtained.

When this matter came up for hearing on 2 June 1994 Cik Lailatul Aziz for the fifth and sixth defendants applied for an adjournment on the ground that she had just been retained. The plaintiffs objected on the ground that these defendants had been served on 11 May 1994. I refused the application. Late instruction of Counsel is not a reasonable ground for adjournment.

Encik S.M. Kam then objection to the plaintiff's application. It was based on the sole ground that the affidavit-in-support of the application averred in its opening statement that it was made by Kwan Yoke Oon (K/P No. 4553948) but the typewritten deponent named at the end of it was Kwan Yoon Fatt. The second, fifth, sixth and 9th defendants all adopted Mr. Kam's submission and asked the application to be dismissed with costs.

Encik Logan Sabapathy pointed out that no prior notice had been given by the defendants or their solicitors that such a preliminary objection was going to be raised. He submitted that the name Kwan Yoon Fatt appearing in the jurat was a clerical error and that it could not have misled the defendants in any way. The person who had infact signed the affidavit as the defendants well knew Kwan Yoke Oon. He was present in Court and at the invitation of the Court gave sworn testimony and the signature was his, that he had infact affirmed the affidavit and the name Kwan Yoon Fatt was a clerical error.

In all the previous proceedings the person who affirmed the affidavits-in-support of the plaintiff's application was Kwan Yoke Oon. His signature was perfectly familiar to the persons who controlled Trends, to Alfred, and to Tan Kim Foong the ninth defendant.

In the circumstances I took the view that the misnomer was a mere irregularity. Relying on O. 41 r. 4 of the Rules of the High Court 1980, I allowed the affidavit to be used subject to a corrective affidavit being filed sworn before the same Commissioner for Oaths before whom he had affirmed his affidavit. This corrective affidavit was filed shortly afterwards.

This objection was a highly technical one with no real merit, and the defect could easily have been corrected if advance notice was given. Even though Trends' Counsel was aware of this clerical error shortly after he took over the conduct of this matter in mid-May 1994 he did not give prior notice of this defect to plaintiff's Counsel until just before the hearing on 2 June 1994. His reasons for withholding this information was that his client Trends had instructed him not to do so, and that it is not the defendant's obligation to assist the plaintiffs in their case since the objection was purely technical and on a point of law.

An affidavit in pending proceedings is a pleading just as much as a statement of claim or a defence. Order 18 r. 8(1)(b) of the Rules of the High Court 1980 imposes a mandatory obligation upon a party to disclose to the other side any matter which, if not specifically pleaded, might take the opposite party by surprise. I would also refer to the Legal Profession (Practice & Etiquette) Rules 1978 r. 12 which prohibits taking a defence intended merely to delay proceedings and r. 32 which exhorts Counsel not to allow the feeling between opposing clients to influence their conduct towards each other. Counsel would do well to remember that as officers of the Court they have an overriding duty to the Court not to ambush their opponents with highly technical points whose effect is only to cause needless embarrassment, expense and delay.

Having staked everything on the one point and failed Counsel for Trends applied or an adjournment. The grounds were that Trends wished to file a reply affidavit to Kwan Yoke Oon's affidavit, and that Trends was not around to instruct him. Sabapathy opposed the application. He pointed out after Trends had been served with the proceedings they had already served a defence on him on 23 March 1994 and had more than two months to prepare its case on the interlocutory application.

Furthermore he pointed out that the affidavit-in-support did not set out any new facts, that it was a mere repetition of the statement of claim which had been pleaded to by Trends, and that the exhibits annexed to the affidavit were documents from the previous proceedings to which Trends was a party.

The crux of Mr. Sabapathy's submission was that no further caveats should be allowed because there was an estoppel by record in the proceedings relating to the removal of the first caveat. In those proceedings Trends had taken the position that under the development agreement KYF was a trustee of the said lands for Trends as beneficial owner, and that Trends as housing developer and beneficial owner had sold individual units in the housing project to various sub-purchasers some of whom were disclosed in the affidavits filed in opposition by Eng Yong Seng a Director of Trends and a holder of a Power of Attorney from KYF when he signed the sale and purchase agreement.

On 8 March 1993 Y.A. Tuan Hishamuddin delivered a judgment *inter partes* that Trends had no caveatable interest in the said lands and ordered the removal of Trends caveat. As long as that judgement stands it is binding on Trends.

From what I can see the basis of that judgment is that since it was not disputed that KYF was the registered owner at the time, the onus was upon Trends to show that the interest in the said lands which Trends claimed raised a serious question to be tried. This onus Trends failed to discharge to the satisfaction of that Court. Four

reasons appear to have predominated in the mind of the learned Judicial Commissioner:-

(1) Although Clause 35 of the Development Agreement expressly provided for KYF to hold the land as Trustee for Trends it was "on the terms and conditions as contained in the development agreement."

(2) That since Trends had failed to provide a performance bond of RM1 million under a supplemental agreement, Trends could not show that KYF was not entitled to terminate both the development agreement and the Power of Attorney;

(3) That the Power of Attorney contained no express power to Eng Yong Seng to sell any part of KYF's land.

(4) That having filed the caveat on 30 June 1992 Trends had not taken timeous action to commence civil proceedings till eight months later on 8 March 1993.

Mr. Sabapathy submitted further that the second, third and fourth caveats filed by Trends had all been removed by Order of this Court and that it would be oppressive to permit repeated caveats being filed by the same caveators on the same grounds.

I received no assistance at all from Trends Counsel on the merits of this application. He merely said he had been instructed to appeal against the dismissal of Trends preliminary objection and had nothing to add.

The second defendant's (Alfred's) submission was that KYF had ceased to be the registered owner and had no *locus standi*. Pacline's title, he claimed was defeasible as it was party to a fraud to deprive Trends of its beneficial ownership of the said lands.

He claimed that both KYF and Pacline had no right to make any claim against him because they had no cause of action against him. Counsel for the fifth and sixth defendants submitted that they were *bona fide* purchasers and that if the order was made, it would cause hardship.

The ninth defendant, Tan Kim Foong had not filed any affidavit in these proceedings. She had filed an affidavit in UP25-3-94 on 26 March 1994 where she had applied to set aside the *exparte* order made on 20 January 1994. She applied to me for leave to use that affidavit in these proceedings which I readily granted. The affidavit was then read out in Court. In substance what Tan Kim Foong was also saying was that she was a *bona fide* purchaser and that if her caveat was not maintained there would be nothing to prevent Pacline from selling off the said lands to her detriment.

So far as Tan Kim Foong and the other sub-purchasers are concerned, I hope I have said enough in my judgment in UP25-3-94 to satisfy even the most myopic observer that in law, even assuming every word in the statutory declaration to be true, these sub-purchasers have no caveatable interest in law. So far as Trends is concerned, I should emphasise that on the facts as they were presented to him in the proceedings relating to the first caveat, all Y.A. Tuan Hishamuddin decided was that on those facts Trends did not have a caveatable interest.

The objective of these proceedings is by way of a *quia timet* injunction to muzzle the defendants from filing any further caveats against the said lands without the leave

of the Court. The effect of my granting such an injunction would be to leave Pacline free to dispose of the said lands or deal with them in any way it pleased between the date it chose so to act, and the date if and when the Court may grant leave to the prospective caveators to act whatever may be the facts.

An interim injunction is a discretionary remedy. Whether it is granted depends upon a variety of factors. The past conduct of the applicant is not irrelevant. The preservation of the *status quo* or the subject matter in dispute till the trial is often the prime concern of the Court. And finally it can be granted on terms.

In the present case the issue of whether the first and second caveat should be removed was argued *inter partes*. It would be invidious to say anything more about them except that in the second case Trends would do well to note that the Court file in civil suit no. 22-111-93 shows that the defendants filed their defence on 2 April 1993 under praecipe no. A005024. This is a printed serial number on Enc. 7 which is the defence denying the existence of any trust. When KYF denied the trust all along, Trends was begging the question when they sued KYF both personally and as trustees. Trends had to establish that first because it was in issue. The purported Judgement in Default of Defence, which Trends keeps harping on was under praecipe no. A005672 (i.e. long after the defence filed). The consent judgment setting aside this purported default judgment was entered on 25 May 1993. It can only be set aside in a fresh action for that purpose on grounds recognised in law to be sufficient.

The third and fourth caveats were both set aside *exparte*. The failure of Pacline's solicitors to serve the *ex parte* order removing Tan Kim Foong's caveat in good time, prompted me to enquire if the *exparte* orders removing the third caveat (made on 11 August 1993) and the fourth caveat (made on 20 January 1994) were served and if so when. It now appears that these *exparte* orders were only served on Trends on 23 June 1994 and 7 June 1994 respectively.

This will not do. However unmeritorious Trends' defence is thought to be, it has a right to be heard, and in my opinion these *exparte* orders should have been served on Trends at the same time they were served on the Registrar or earlier. Since this was not done, I think that Trends now has a right to apply to have those *exparte* orders set aside if it thinks it has reasonable grounds for doing so. I direct that any such application be made within twenty-one days from the delivery of this judgement, if Trends is minded to challenge their removal.

Apart from civil suit 22-111-93 filed by Trends against KYF and Pacline for a declaration of trust, Tan Kim Foong and eight other purchasers also filed a suit on 6 June 1994 for similar relief arising out of the same subject matter - civil suit no. 22-285-94.

From the material before me, there appears to be credible evidence that Trends performed at least a part of its obligations under the development agreement and thereby incurred loss and expense. As housing developers they may have also incurred onerous statutory responsibilities under the Housing Developers Act. What claims Trends may have against KYF in this respect and whether they sound in specific performance, damages, quantum merit or not at all remains to be seen. What I am not prepared to say is that merely because Trends have been denied a caveatable interest in the first caveat proceedings they are not entitled to injunctive

relief for the preservation of the said lands until their claims have been heard. Likewise merely because the sub-purchasers do not have a caveatable interest I am not prepared to say that they are not entitled to injunctive relief at least to the extent of their monetary claims. Equity however aids the diligent and if Trends and/or the sub-purchasers mean to pursue such reliefs I direct that they file their applications within twenty-one days from this judgment, in the appropriate civil suits.

With a view to early disposal of these suits I direct an application be made by the respective plaintiffs that civil suit 22-111-93 and civil suit 25-12-94 be consolidated and be heard together with civil suit 25-55-94 by way of an early trial before another Judge, in such manner as he may direct.

In the meantime I hereby grant the interlocutory relief prayed for by the plaintiffs *viz*. the defendants or any of them shall not lodge any further caveats against the said land without leave of this Court first had and obtained but this relief is granted subject to the condition that Pacline shall not transfer, charge or otherwise deal with the said land for a period of four months from the date hereof unless otherwise ordered by this Court. In the event that Trends and the sub-purchasers do not file their applications for injunctive relief within twenty-one days from the date of this judgment, this condition shall cease to have any further effect. This order will enable the parties to ensure that judicial consideration be given to whether any useful purpose will be served in binding the said lands if Trends and/or the sub-purchasers are unable to show that they have a serious claim for specific performance and that damages are not an adequate remedy. The costs of this application shall be costs in the cause.